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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68850; File No. SR-NASDAQ-2013-017)

February 6, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Restore Certain Requirements that Were Inadvertently Deleted from Rule 5815 Relating to a Staff Delisting Determination, Public Reprimand Letter, or Written Denial of a Listing Application

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on January 25, 2013, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to restore certain requirements that were inadvertently deleted when Rule 5815 was adopted in March 2009 and remove from the rules fees that have expired.

The text of the proposed rule change is below.<sup>3</sup> Proposed new language is *italicized*; proposed deletions are in brackets.

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**5815. Review of Staff Determinations by Hearings Panel**

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaq.cchwallstreet.com>.

When a Company receives a Staff Delisting Determination or a Public Reprimand Letter issued by the Listing Qualifications Department, or when its application for initial listing is denied, it may request in writing that the Hearings Panel review the matter in a written or an oral hearing. This section sets forth the procedures for requesting a hearing before a Hearings Panel, describes the Hearings Panel and the possible outcomes of a hearing, and sets forth Hearings Panel procedures.

**(a) Procedures for Requesting and Preparing for a Hearing**

**(1) Timely Request Stays Delisting**

(A) A Company may, within seven calendar days of the date of the Staff Delisting Determination notification, Public Reprimand Letter, or written denial of a listing application, request a written or oral hearing before a Hearings Panel to review the Staff Delisting Determination, Public Reprimand Letter, or written denial of a listing application. Subject to the limitation in paragraph (B) below, a timely request for a hearing will stay the suspension and delisting action pending the issuance of a written Panel Decision. Requests for hearings should be submitted in writing to the Hearings Department.

(B) No changes.

**(2) Failure to Request Results in Immediate Delisting**

If a Company fails to request in writing a hearing within seven calendar days, it waives its right to request review of a Delisting Determination, Public Reprimand Letter, or written denial of an initial listing application. In [that event,] the case of a Company's failure to timely request a hearing to review a Delisting Determination, the Hearings

Department will take action to suspend trading of the securities and follow procedures to delist the securities.

### **(3) Fees**

Within 15 calendar days of the date of the Staff Delisting Determination, Public Reprimand Letter, or written denial of an initial listing application, the Company must submit a hearing fee of \$10,000. [However, if the hearing request relates to a Staff Delisting Determination dated before January 2, 2013, the Company must submit a hearing fee as follows:

(A) when the Company has requested a written hearing, \$4,000; or

(B) when the Company has requested an oral hearing, whether in person or by telephone, \$5,000.]

(4) – (6) No changes.

(b) – (d) No changes.

### **5820. Appeal to the Nasdaq Listing and Hearing Review Council**

A Company may appeal a Panel Decision to the Listing Council. The Listing Council may also call for review a Panel Decision on its own initiative. This Rule 5820 describes the procedures applicable to appeals and calls for review.

#### **(a) Procedure for Requesting Appeal**

A Company may appeal any Panel Decision to the Listing Council by submitting a written request for appeal and a fee of \$10,000 to the Nasdaq Office of Appeals and Review within 15 calendar days of the date of the Panel Decision. [However, if the appeal relates to a Panel Decision dated before January 2, 2013, the applicable fee is \$4,000.] An appeal will not operate as a stay of the Panel Decision. Upon receipt of the appeal request and the applicable fee, the Nasdaq Office of Appeals and Review will acknowledge the Company's request and provide deadlines for the Company to provide written submissions.

(b) – (e) No changes.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to the Nasdaq Listing Rule Series 5800, companies may seek review of a determination by Nasdaq Staff to deny initial listing or delist a company's securities or to issue a Public Reprimand Letter, by requesting an oral or written hearing before an independent Hearings Panel. The proposed rule change restores certain provisions about the Hearings process that were inadvertently deleted when Rule 5815 was adopted in March 2009 as part of a comprehensive re-write of the listing rules, designed to improve the organization of the rules, eliminate redundancies and simplify the rule language.<sup>4</sup> In that rule filing, Nasdaq specifically represented that "it is not making any substantive changes to the Listing Rules in this proposal."<sup>5</sup>

First, the proposed rule change clarifies that fees for a hearing are applicable to any requests for a hearing, whether sought for review of a Public Reprimand Letter, Staff denial of an initial listing application, or review of a delisting determination. The preamble text in Rule 5815

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<sup>4</sup> Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR-NASDAQ -2009-018).

<sup>5</sup> Id. at 15553.

makes clear that a Company may request a hearing for review of a Public Reprimand or denial of an initial listing application, as well as a Delisting Determination. Similarly, the predecessor to Rule 5815, former Rule 4805, allowed a company to request review of a “Staff Determination,” which was defined in former Rule 4801(k)(1) as “a written determination by the Listing Department to limit or prohibit the initial or continued listing of an issuer’s securities ... or ... a public reprimand letter...”<sup>6</sup> However, while former Rule 4805(d) required a company to pay the applicable fee whenever it requested a hearing for review of a Staff Determination, Rule 5815(a)(3) does not specifically impose a fee for requests for review of a Public Reprimand Letter or denial of an initial listing application. The proposed rule change amends Rule 5815(a)(3) to state that fees for hearings continue to apply to requests for review of a Public Reprimand and denial of an initial listing application.<sup>7</sup>

Second, the proposed rule change restores the requirement that a denial of initial listing must be in writing in order to be eligible for review under Rule 5815. This requirement was also inadvertently deleted during the same re-write of the listing rules. As noted above, the definition in the prior rules of a “Staff Determination,” which could be appealed to the Panel, was “a written determination by the Listing Department.” This requirement helped assure that Staff has completed its review before a matter could proceed to the Panel, and that the Panel has formal documentation of Staff’s concerns when it considers the matter, thereby allowing the Panel to fully fulfill its investor protection mandates and allow companies a fair and substantive review process. Nasdaq proposes to restore this requirement to add transparency to the rules.

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<sup>6</sup> The former Listing Rules are available at [http://nasdaq.cchwallstreet.com/NASDAQ/pdf/old\\_listing\\_rules.pdf](http://nasdaq.cchwallstreet.com/NASDAQ/pdf/old_listing_rules.pdf).

<sup>7</sup> Since the new rulebook was adopted, the practice of applying fees to all requests for hearings has continued.

Finally, the proposed rule change removes language in Rules 5815(a)(3) and 5820 that describes fees that are no longer applicable. Nasdaq adopted new fees effective for companies that request review of a Staff Delisting Determination issued on or after January 2, 2013 or a Panel Decision issued on or after January 2, 2013. This rule change removes from the rule text the fees applicable before that date, because no companies are eligible to request review under the old fees.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general and with Sections 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market systems, and in general to protect investors and the public interest. The proposed amendment will provide clarity and reflect the legacy rule, which Nasdaq did not intend to modify, and the continued practice of applying fees to requests for all hearings and allowing appeals only of written decisions to deny initial inclusion. The proposed rule change will also conform the various parts of Rule 5815, thereby clarifying Nasdaq's rules to the benefit of investors and the public interest.

Nasdaq also believes that the proposed changes are consistent with Section 6(b)(7) of the Act,<sup>10</sup> in that the proposed changes are consistent with the provision by the Exchange of fair procedures for the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange. In particular, Nasdaq believes that the clarifications about

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<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>10</sup> 15. U.S.C. 78f(b)(7).

the availability and requirements for an appeal support a fair process designed to provide substantive review of formal determinations of Nasdaq.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The market for listing services is extremely competitive and listed companies may freely choose alternative venues. For this reason, Nasdaq does not believe that the proposed rule change will result in any burden on competition for listings.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were n either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6)<sup>12</sup> thereunder because the proposal does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.<sup>13</sup>

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.



At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>14</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2013-017 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2013-017. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(C).

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2013-017 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).